United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7397

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In the
United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-7397

STECHER-TRAUNG-SCHMIDT CORPORATION,
Plaintiff-Appellee,

vs.

M. A. SELF, BEE CHEMICAL COMPANY, ROULSTON & COMPANY, INC., THOMAS ROULSTON, ARTHUR S. HECKER, and JOHN DOE,
Defendants,

M. A. SELF, BEE CHEMICAL COMPANY and ARTHUR S. HECKER,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of New York

REPLY BRIEF FOR APPELLANTS M. A. SELF, BEE CHEMICAL COMPANY AND ARTHUR S. HECKER

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PRELIMINARY STATEMENT

The District Court granted a preliminary injunction in this action based upon the pleadings, affidavits, exhibits and briefs submitted by the parties and, by stipulation, no evidentiary hearing was held. This Court, therefore, has the same evidence before it as the District Court re-

garding the propriety of a preliminary injunction in this matter. Moreover, with all deference to the District Court, the opinion rendered by Judge Burke includes no findings of fact from which his conclusion of likely irreparable harm can be inferred. Due to the state of the law at the time he considered his decision, which will be further discussed herein, the omission of such a determination is understandable. But the law changed on the very day Judge Burke rendered his decision and we respectfully request this court to consider this case, upon the same record as was before the District Court, in light of this change.

Despite the appellee's protestation, this case simply involves appellants' alleged failure to file timely the factual statement ("Schedule 13D") required by Section 13(d) of the Securities Exchange Act of 1934 (the "Act"), and all the pleadings, exhibits and affidavits go to the sole issues of (a) whether it is probable that such a statement is required, (b) if it was required, when it should have been filed, (c) if it is probable that the statement was required and not timely filed is it probable appellee will obtain the relief requested in its complaint, and then, (d) if all these probabilities are resolved in appellee's favor, what preliminary relief, if any should be granted. This appeal does not involve a tender offer and does not involve allegations of omissions or misstatements of facts and certainly does not involve any improper conduct on the part of appellants.

An additional preliminary matter is the reason appellants filed a Schedule 13D after the District Court rendered its decision. Appellants did not, as appellee suggests, purposely await this decision before filing their Schedule 13D, for appellants' position is, and has been, that they are not required to make such a filing. Ap-

pellants, however, although disagreeing with the District Court's decision, were not blind to its effect. Prior to the District Court's decision, appellants properly relied on their belief that no filing was required. Once the opinion was rendered, however, appellants, in good faith, felt that the proper response to that opinion was to file the Schedule 13D and prosecute this appeal to remove the strictures of that opinion. Appellee, of course, takes issue with the propriety of appellants' Schedule 13D, which will be discussed herein. The propriety of that statement is not before this Court, however, appellants firmly believe that their Schedule 13D is in all respects complete and accurate.

We submit that the preliminary relief granted by the District Court, which freezes Bee Chemical Company's stock position in appellee and disenfranchises Bee Chemical Company from its voting and other rights as a stockholder of appellee, aside from punishing appellants for their alleged violation and, perhaps, benefiting appellee's management, has no benefit whatsoever for appellee. What *benefit* is there for appellee's stockholders if a possible purchaser of their shares is removed from the thinly traded market? What *benefit* is there for appellee's stockholders if Bee Chemical Company is prohibited from expressing to them its views on proposed management action? And what *benefit* accrues to such shareholders by sterilizing Bee Chemical Company's right to vote? We submit there is no benefit to them and in just those circumstances Bee Chemical Company is harmed.

In addition, where is the *harm* to appellee? If there was any harm due to appellants' not having on file a Schedule 13D (we submit any such harm in any event would be speculative), such putative harm no longer exists for there is a Schedule 13D by appellants now

on file. The alleged harm in the complaint is not only devoid of rationality but is a complete conjecture. Appellee, moreover, neither specifies nor justifies in its Brief its claim of irreparable harm, but rather, seemingly accepts such harm as a *given* in this matter. Appellee does not set forth any facts supporting *how,* as alleged in appellee's complaint, appellants' failure to file a Schedule 13D will dislocate the normal operations of appellee, will create uncertainty, will severely affect the orderly market for appellee's stock, will erode the alleged confidence of the financial community and customers of appellee, will adversely affect the morale of appellee's employees and will continue uninformed investment decisions. It must be assumed, therefore, that appellee has no supporting facts and that the alleged harm is pure speculation.

We respectfully submit, therefore, that the granting of a preliminary injunction in this matter was not proper, and, therefore, the preliminary injunction should be dissolved.

ARGUMENT

I.

APPELLANTS AND THE OTHER DEFENDANTS DID NOT ACT AS A "GROUP" WITHIN THE MEANING OF SECTION 13(d) OF THE SECURITIES EXCHANGE ACT OF 1934.

Two criteria must be met in order for appellants to be deemed members of a "group" within the meaning of Section 13(d) of the Act: (1) The members must agree to act in concert for the purpose of acquiring, holding or disposing of securities; and (2) The members must thereafter own or acquire in excess of 5% of a class of registered equity securities. *Texasgulf, Inc.* v. *Canada Development Corp.*, (1973 Binder) CCH Fed. Sec. L. Rep. ¶94,160 (S.D. Tex. 1973) at 94,683.

(a) The Alleged Bee-Self Group.

Appellants, of course, never beneficially owned more than 4.85% of appellee's outstanding shares, which Bee Chemical Company could legitimately acquire without the need for filing a Schedule 13D. Appellants after acquiring such shares had contact in 1974 with plaintiff's representatives *solely* with a view to a merger of the two firms. (Affidavit in Opposition to Motion for Temporary Restraining Order and Preliminary and Permanent Injunction—A. 157) Attempts to quote portions of the letter of appellant M. A. Self to Roulston & Company, Inc. ("Roulston") dated May 2, 1974 (A. 220-221), referred to by appellee in its Brief, out of context in which it was written, are clearly inappropriate. That letter by its terms did not solely deal with negotiations with appellee, but indicated that other compatible companies would be considered by Bee Chemical Company.

Certainly no conspiracy to acquire secretly appellee's shares can be inferred from that correspondence. It is also noteworthy that appellee at p. 12 of its Brief is clearly wrong in stating that appellants' approach to appellee in 1974 was not limited to a merger. Self in his letter is responding to Roulston's letter, dated April 19, 1974 (A. 219) which states:

> "The primary purpose of our rentention is to assist Bee Chemical Company in bringing about a *merger* with the Stecher-Traung-Schmidt Corporation. However, our work may be requested in other areas where a possible merger or acquisition might take place." (Emphasis added)

Self's reply amplified Bee Chemical Company's requirements of Roulston, but in no manner expanded the scope of negotiations with appellee to a concerted acquisition as appellee suggests.

Furthermore, this correspondence which was intended by Self and Roulston to be a complete expression of their agreement, does not mention at all the shares purchased by Roulston for its other customer. If there were an arrangement, as appellee suggests, for "warehousing" appellee's shares, whereby Roulston presumably would be compensated by Bee Chemical Company for this activity, it is inconceivable that it would not be mentioned in this correspondence. Whatever might be standard "take-over practice," commercial realities are that Roulston, if it had such an arrangement with appellants, would have mentioned the other shares in its letter so that it or its customer would not be left holding the other shares. That the alleged arrangement was not mentioned in this correspondence is fatal to appellee's characterization of the Bee-Self Group. Appellee, therefore, cannot clearly show that Bee Chemical Company's agreement with Roulston covered the shares Roulston purchased for its other customer.

Not every agreement directed toward a merger leads to a filing under Section 13(d). If this were the case, every letter of intent to merge and every merger agreement between companies would generate a Schedule 13D, since the surviving corporation would in each case have agreed to acquire shares of the non-surviving corporation. That a Schedule 13D is not required in such cases is indicated by the provisions of subparagraph (6)(A) of Section 13(d), which states:

> "(6) The provisions of this subsection [Section 13 (d)] shall not apply to—
>
> (A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933; . . ." (15 U.S.C. §78m(d) (6)).

The only agreement between Roulston and Bee Chemical Company was that Bee Chemical Company would attempt to acquire by a merger with appellee, appellee's shares, or vice versa. That merger necessarily would have required a registration statement under the Securities Act of 1933 and, therefore, by the provisions of Section 13(d) (6), the agreement between Bee Chemical Company and its merger-broker for the purpose of a merger, not for the purpose of secretly accumulating quantities of appellee's shares, is not within the intent of Section 13(d). The only type of agreement regulated by that section is one in which shareholders or persons who become shareholders somehow pool their shares. Appellants vigorously deny any such pooling arrangement.

The only reasonable implications from the case of *Corenco Corporation* v. *Schiavone & Sons, Inc.*, 488 F.2d 207 (2d Cir. 1973), are that (a) the business relationship between a purchaser and his broker does not create the inference, as appellee attempts to do in this case,

that there is a conspiracy between them, and (b) that appellee must show a clear agreement between them to combine or pool their shares in order for a "group" to exist. The discussion in the *Corenco* case concerning the absence of a finder's fee goes only to the point that this was an additional element why there was no agreement or conspiracy and there is no implication that a fee alone would have been sufficient to deem the defendants in that case a "group." The absence of a "group" in *Corenco* was not determined by the fee matter, but by the absence of an agreement between the defendants to combine or pool shares. Similarly, in the case of appellants and Roulston, there was and is no such agreement.

The reference to the response of the staff of the Securities and Exchange Commission ("SEC") in *May Pac Management Company,* ('73-'74 Binder) CCH Fed. Sec. Law Rep. ¶79,679, made by appellee at pp. 17-18 of its Brief, in connection with whether appellants and Roulston are members of a "group" is tenuous at best. That the staff of the SEC stated that the writer of the subject letter "may be subject" to the cited sections of the Act is not a position nor even a warning, but a mere delineation of areas of the Act that touch upon the writer's proposed activities. In addition, the writer proposed only to deal with "selling clients." The staff response hardly supports the proposition that the writer of the letter would be a member of a "group" for purposes of Section 13(d).

The activities of Roulston on behalf of Bee Chemical Company did not result in the creation of the Bee-Self or any other "group" for there was no agreement between Roulston and the appellants toward any concerted action regarding shares of appellee.

(b) Beneficial Ownership.

In order for appellee to attribute to appellants any other shares of appellee, it must show not only one agreement, i.e., between Roulston and appellants, but two agreements, i.e., between Roulston and appellants and between Roulston and its other customer. Since it has shown neither agreement, appellee should not succeed in this action. Appellants strongly deny beneficial ownership, direct or indirect, of more than 4.85% of appellee's outstanding shares. Appellee has shown, and there is, no agreement between appellants and Roulston to pool any voting rights. A mere business relationship does not create an admitted agreement to pool votes as appellee suggests. *Corenco Corporation* v. *Schiavone & Sons, Inc., supra.* Obviously, we submit that the lack of any concerted pooling agreement between Roulston and appellants makes moot the relationship between Roulston and its other customer. This is so because Roulston is the only alleged tie between the shares owned by Bee Chemical Company and the shares owned by the other customer, for it is uncontested that Roulston purchased the additional shares for a European customer unrelated and unknown to appellants. (Affidavit of Thomas H. Roulston—A.242).

An agreement between Roulston and its European customer, however, has not been shown by appellee either. Rather, appellee assumes without support two critical items which are necessary for beneficial ownership of its customer's shares to be attributed to Roulston or to appellants through Roulston: (a) an agreement or arrangement between Roulston and its customer, whereby (b) such customer's shares would be pooled with the shares of Bee Chemical Company to exercise voting control over

appellee. Appellee's assumptions will not sustain an injunction, for aside from the conspiracy hypothesis suggested by plaintiff, other reasonable assumptions can be made for the purchase by Roulston's other customer. First, Roulston could have reasonably determined that appellee's stock was being undervalued by the market and represented a good investment, whether there should be a merger between appellee and Bee Chemical Company or not. Although a risk investment, the possible incremental increase in the market value of the stock of appellee, if market or other events took a turn for the better, could be substantially greater than for blue chip stocks. It is not unknown for European investors to speculate. Secondly, Roulston knew of the merger proposal by Bee Chemical Company and felt it was a good thing for both companies. Believing that the combined company's shares after the merger would be valued higher than appellee's shares alone, he could recommend the purchase with only the interests of his other customer in mind. Thirdly, the European investor could have made a pure, speculative gamble on appellee in hopes appellee would become another Xerox. All these assumptions are at least as reasonable as appellee's alleged conspiracy and we submit more so, for what possible benefit could the European customer obtain from accomodating Bee Chemical Company. The European customer advanced a substantial amount of money to invest in and hold (now for more than a year) shares of appellee. If there had been a pooling or warehousing deal with appellants, we submit that Roulston's other customer would not have waited through the market decline of 1974, but would have terminated any arrangement with appellants long ago and forced appellants to buy its shares. This hasn't happened and it hasn't happened because, despite appellee's suspicions, there was

no such arrangement. As the court stated in *Brooklyn Nat. League Baseball Club* v. *Pasquel,* 66 F. Supp. 117, 119 (E.D. Mo. 1946), in which a news reporter was alleged to be a party to an unlawful conspiracy:

> "We are aware that a conspiracy may be and usually is proven by circumstantial evidence. But such evidence must be consistent with the guilt of accused. Here the evidence is as consistent with Gillespie's alleged sole purpose of prosecuting his business of gathering news, as with being engaged in a conspiracy to cause plaintiff's players to breach their contracts. Inspired by zeal for a "scoop," Gillespie aggressively pressed his opportunities. He was willing to pay a consideration for information by performing favors for the Pasquels. In doing so, he subjected himself to suspicion of being a party to the Pasquel's campaign or conspiracy. *Suspicion will not sustain a judgment.* Assume the converse of our conclusion—the issuance of temporary injunction against Gillespie. Being based upon acts shown, of necessity it would include restraining repetition of such acts. None of Gillespie's acts are subject to restraint by Court order if he is not a party to the conspiracy charged and they were persecuted solely to secure news. There is no proof they were prosecuted for any other purpose. The action will be dismissed as to Gillespie." (Emphasis added)

Similarly, appellee's suspicions are not sufficient in this matter. Roulston's activities are as consistent with its business of being a broker as with being engaged in a conspiracy regarding plaintiff's shares. There is no proof they were prosecuted for any other purpose and appellee has failed to show a conspiracy.

Appellee in referring to the response of the staff of the SEC in *Stewart Fund Managers Limited,* (1974-1975 Binder) CCH Fed. Sec. Law Rep. ¶80,047, has made

the additional unsupportable assumption that Roulston's other customer is an investment company. There may be a special relationship between an investment company and its investment adviser, but that relationship has no relevance to this matter. Appellee cannot assume a special relationship, it must clearly show one. This it has not done.

Appellee in its brief has taken wholly unwarranted exception to the affidavit of Thomas H. Roulston. (A. 240) Appellee alleges a lack of candor because of certain claimed omissions in the affidavit, and places undue importance on the fact that Roulston did not appeal the District Court decision. We submit that Roulston submitted his affidavit on April 10, 1975, a mere two days after service of appellee's long complaint and other pleadings, exhibits and affidavits on him. (See Docket Entries—A. 1) An affidavit is not an answer to the complaint. In the hurried atmosphere caused by appellee's action, perhaps matters were not stated with the clarity that would have been made had more time been available. We submit, however, that Roulston made completely clear those matters which were necessary: that he had no voting control or beneficial ownership over any of appellee's shares and that there was no concerted agreement with appellants to acquire to vote shares of appellee. These facts cannot be denied by appellee and that is the reason for the attack on Roulston's credibility.

Appellee's right to relief is dependent upon its alleged conspiracy theory. As stated by the court in *K-2 Ski Company* v. *Head Ski Co.*, 467 F.2d 1087, 1089 (9th Cir. 1972):

> "K-2's right to ultimate relief hinges upon Head's commission of those [wrongful] acts; to obtain preliminary relief, the burden rested upon K-2 [to] show

> the probability that Head had committed them. K-2 has not, to use Professor Moore's phrase, established a 'fairly reliable factual basis' for preliminary relief."

Appellee has shown no reliable factual basis for its conspiracy theory. Appellants and Roulston did not constitute a "group" for purposes of Section 13(d) and the District Court was erroneous in holding that such a group was formed. Appellee has made no clear showing of probable success on the merits of this matter relating to a violation of Section 13(d).

II.

THE GRANTING OF THE PRELIMINARY INJUNCTION WAS AN ABUSE OF DISCRETION, SINCE NO HARM WAS SHOWN, AND WAS BASED UPON THE ERRONEOUS PREMISE THAT A VIOLATION OF THE STATUTE ALONE CONSTITUTED IRREPARABLE HARM.

This Court is in an appropriate position to review the decision of the District Court since the record in this case consists solely of the written pleadings, affidavits, exhibits and briefs submitted to Judge Burke.

The scope of an appellate court's review of a preliminary injunction is whether the District Court abused its discretion in granting the injunction or rested his analysis upon an erroneous premise. *Delaware & Hudson Railway Co.* v. *United Transp. Union*, 450 F.2d 603 (D.C. Cir. 1971); *Douglas* v. *Beneficial Finance Co. of Anchorage*, 469 F.2d 453 (9th Cir. 1972).

In order for a preliminary injunction to issue, the party requesting relief must make a clear showing of both (a) probable success on the merits and (b) possible irreparable injury. A balance of hardships, tipping to-

ward the party requesting relief, has also been applied where there have been serious questions on the merits. *Sonesta International Hotels Corp.* v. *Wellington Associates,* 483 F.2d 247 (2d Cir. 1973); *Gulf & Western Industries* v. *The Great Atlantic & Pacific Tea Co.,* 476 F.2d 687 (2d Cir. 1969). But see, *Sampson* v. *Murray,* 415 U.S. 61, 88, 39 L. Ed. 2d 166, 185, 94 S. Ct. 937 (1974), regarding the balance of hardships approach.

We submit that (a) since the injunction in large part restrains lawful acts of appellants and (b) since appellee has made no clear showing of probable success on the merits nor of any probable harm whatsoever to appellee, the preliminary injunction was an abuse of the District Court's discretion. Moreover, the District Court's decision was based upon the erroneous premise that a technical violation of Section 13(d) constituted irreparable harm.

We note also that the District Court only considered the likelihood of success on the merits of appellee's claim and the possibility of irreparable harm, and did not consider a balancing of hardships. In either event, however, since appellee has shown no probable harm, the preliminary injunction should not have been issued.

(a) The District Court Decision Restrains Lawful Acts.

The only possible unlawful conduct allegedly committed by appellants was their alleged failure to file a Schedule 13D. The preliminary injunction issued by the District Court, (A. 383-384), however, enjoins appellants from voting shares of appellee or soliciting the votes of other shareholders of appellee and from purchasing any additional shares of appellee. We submit that such restrained activities are completely lawful and that the injunction issued by the District Court is unduly broad

in going far beyond restraining alleged unlawful conduct on the part of appellants. This issue was considered in *E. W. Bliss Company* v. *Struthers-Dunn, Inc.*, 408 F.2d 1108 (8th Cir. 1969), in connection with an alleged violation of trade secrets. The court at 408 F. 2d 1114 held that the District Court's order creating in effect a covenant not to compete ". . . is excessively broad and consequently invalid since it goes far beyond restraining unlawful conduct on the part of defendants." Cf. *Corica* v. *Ragen*, 140 F. 2d 496 (7th Cir. 1944).

Therefore even if, as appellee claims in its Brief, appellants' violation is not technical, the relief preliminarily obtained and ultimately sought by appellee in its complaint is unjustified and invalid since lawful conduct is and would be proscribed.

(b) Absence of Irreparable Harm.

The absence of any harm to appellee goes to both the merits of its action, since it cannot succeed in obtaining the relief requested in its complaint without showing harm, and the preliminary injunction. Appellee does not discuss in its brief any of the elements of alleged harm recited in its complaint, but relies solely on the conclusory statement in the District Court's opinion. We submit that any harm appellee may incur as a result of appellants' alleged violation of Section 13(d) is speculative and has not been reasonably substantiated.

Appellee attempts to distinguish *Rondeau* v. *Mosinee Paper Corp.*, ... U.S. ....., 45 L. Ed. 2d 12 (June 17, 1975), on the grounds that appellants' alleged violation of Section 13(d) was not "technical." First, appellee alleges that, whereas Rondeau's violation was due to a lack of familiarity with the securities laws, appellants and/or Roulston were familiar with Section 13(d). We

submit that it is one thing to know that a person must not purchase more than 5% (which appellants' purchases never exceeded) and it is another to attempt to grasp appellee's complex conspiracy theory whereby appellants are imputed to beneficially own shares acquired by an unrelated investor in Europe. We further submit that appellants obviously were justifiably not familiar with this theory, since it is erroneous, and are, therefore, more innocent in this respect than Rondeau, who committed an admitted and obvious violation of the 5% requirement.

Appellee's second distinction is that, whereas Rondeau had no intent to take control of Mosinee Paper Corp., appellants had this intent. Appellants could not reasonably have expected to obtain control of appellee with 4.85% of its shares. Appellants thereafter entered into merger discussions with appellee which clearly indicates appellants did not intend to acquire control by further purchases.

Thirdly, appellee raises the peripheral issue not before this Court that appellant M. A. Self's telephone conversation with appellee's president in April, 1975 constituted a tender offer. That telephone conversation did not constitute a tender offer or any other device to obtain control of appellee. Moreover, there is clearly nothing unlawful in appellants' alleged desire to control plaintiff. In *Rondeau,* there was no immediate expectation that if the injunction was not granted, control would thereupon be shifted. The Supreme Court in *Rondeau, supra,* was merely stating the obvious; the case dealt with failure to file a form, not a contested tender offer. In this respect too this case is similar; for no contested tender offer is at issue, but merely the failure to file a form.

Appellee's fourth distinction, that appellant's actions were covert and conspiratorial, is fully contradicted by the

fact that open merger discussions were held with appellee from at least April, 1974.

Finally, appellee claims that appellants' Schedule 13D, set forth in full at A. 424, is not proper in two respects. First, appellee claims that appellants misrepresented the purpose of its purchase of appellee's stock as called for by Item 4 of Schedule 13D. To complete appellee's partial quotation from Item 4 of appellant's Schedule 13D, we herein set forth the complete response to Item 4:

> "*Item 4. Purpose of Transaction*
>
> The purpose of the purchase by Bee Chemical Company [was] to acquire an investment in STS. [sic.] The reporting persons do not exercise control over STS. Although the purpose of the purchase of shares was not to acquire control, Bee Chemical Company from the period April 1974 through July 17, 1974 engaged in merger discussions with STS, which were terminated by STS on July 17, 1974. Since that date, as a stockholder of STS, Bee Chemical Company has expressed its concern to STS management over the poor return on equity of STS and in the direction STS was pursuing by making large capital investments in STS's custom printing operations. From the period March 27, 1975 through April 4, 1975, Bee Chemical Company engaged in further discussions with STS management for a cash acquisition of STS by Bee Chemical Company which resulted in a proposal by Bee Chemical Company to management of STS that Bee Chemical Company was prepared to make an offer to purchase all the shares of STS at $8.00 per share, if, and only if, management of STS would cooperate with Bee Chemical Company. This proposal was also conditioned upon receiving at least 66-2/3% agreement of STS shareholders. In response to these discussions, management of STS instituted injunctive legal proceedings against Bee Chemical Company and the other

reporting persons in the Federal District Court for the Western District of New York in the above referenced legal action.

Bee Chemical Company has sought representation on the Board of Directors of STS and has sought to acquire additional shares of STS in privately negotiated transactions.

Bee Chemical Company has no present plans to liquidate STS or sell its assets. Bee Chemical Company considers that a merger or combination of Bee Chemical Company and STS would be of benefit to both companies. Other than said merger, Bee Chemical Company considers that the emphasis of STS on its custom printing operations should be directed, in part, to more profitable lines. Bee Chemical Company continues to look favorably upon an acquisition of STS. It has no present plans, however, to acquire STS without the cooperation of STS management."

We submit that appellants' response fully states their purpose. An acquisition of 4.85% of plaintiff's shares was simply not an acquisition of control. Moreover, appellants fully explained their contacts with appellee.

Appellee next alleges that Item 3 is defective because appellants did not set forth Bee Chemical Company's borrowings in connection with its business. Item 3 requires a description of borrowings only if the funds were borrowed for the purpose of acquiring appellee's shares. We submit that no loan was obtained for this purpose, but rather the loans obtained by Bee Chemical Company were used to finance its general operations.

In no respect is appellants' Schedule 13D false or misleading. Appellee merely raises this and other issues to cloud the fact that appellee has sustained no harm to warrant preliminary injunctive relief.

That appellee's complaint is verified lends no support to its speculative and conclusory allegations of harm. The complaint contains no specific facts of irreparable injury, loss or damage. Moreover, even appellee's allegations of harm are not believable. It is inconceivable that appellants' alleged untimely filing of Schedule 13D could dislocate the normal operations of appellee, create uncertainty, severely affect the orderly market for appellee's stock, erode the confidence of the financial community and customers of appellee, adversely affect the morale of appellee's employees and continue uninformed investment decisions as appellee claims in its complaint.

We invite this Court's attention to the recent case of *Jewelcor Incorporated* v. *Pearlman,* 397 F. Supp. 221 (S.D.N.Y. 1975), which involved motions for preliminary injunctions by both a putative take-over target company and an alleged tender offeror, each of which charged the other with violations, among others, of Section 13(d) of the Act.

Significantly in that case the court concluded on the basis of the evidence that the putative target company had demonstrated a likelihood that it will succeed on the merits at trial with respect to the issue of whether the alleged tender offeror's Schedule 13D was false and misleading. Despite this conclusion the court went on to hold:

> "However, we do not find that the balance of hardships in denying injunctive relief here is such that Lafayette [the putative target company] will be unduly harmed by a denial of injunctive relief. This is not a tender offer or a merger where the denial of a preliminary injunction will make it difficult to "unscramble the eggs" if relief is finally given to the party seeking the injunction. *Sonesta International Hotels Corp* v. *Wellington Assoc., supra,* 483 F.2d at 250 (citations omitted). Rather, the denial of injunc-

> tive relief here will only mean that Jewelcor [the alleged tender offerer] would be able to vote its shares and proxies against Proposal No. 2, which does not fundamentally affect the nature of Jewelcor's business operations or management. In addition, while the denial of injunctive relief will permit Jewelcor to purchase further shares of Lafayette, when and if Jewelcor does decide to make a tender offer or does plan a merger, such future purchases will not immediately affect Lafayette, since Jewelcor will be obligated to disclose any changed intentions in a subsequent Schedule 13D." 397 F. Supp. at 241.

Even more significantly, with respect to the motion for a preliminary injunction by the alleged tender offeror claiming that management of the putative target company formed a "group" within the meaning of Section 13(d)(1), the court found evidence sufficient to enable it to conclude that the target company management may have violated Section 13(d), since they did not file a Schedule 13D. Nonetheless, the court concluded:

> "Although Jewelcor is likely to prevail on the merits on these issues after a full trial, it does not necessarily follow that Jewelcor is entitled to injunctive relief. To obtain such a remedy Jewelcor must also demonstrate that it will suffer irreparable harm, or that the balance of hardships tips decidedly in its favor. *Sonesta International Hotels Corp.* v. *Wellington Assoc., supra,* 483 F.2d at 250. But see *Sampson* v. v. *Murray, supra,* 415 U.S. at 88, 94 S.Ct. 937. . . . To determine whether irreparable harm or an inequitable balance of hardships will flow from a denial of injunctive relief, we must balance the equities. If Jewelcor's motion is granted, 'no matter how such [relief] was explained to the shareholders by the present management, a substantial number of shareholders would regard its issuance as a determination of the alleged Securities Act violations on the merits

and a finding that the incumbent management had acted improperly.' *D-Z Investment Co.* v. *Holloway* [1973-74 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,588, at 96,061-62 (S.D.N.Y., 1974). . . . Additionally, if Jewelcor's motion is denied, we foresee no immediate harm, and find that the hardships do not tip decidedly in its favor. This finding is based on our view that no immediate adverse consequences will flow from a denial of injunctive relief. Jewelcor will not be precluded from obtaining control of Lafayette; the amendments, if approved and allowed to stand, will merely make such change of control more difficult. Jewelcor would still be free to pursue a 'friendly' tender or merger with Lafayette. Moreover, denial of Jewelcor's motion will not give Lafayette license to make a tender offer for its own stock. If Lafayette pursues such a course, it must file the appropriate statements required by the federal securities laws, and Lafayette shareholders will be given a full opportunity to assess that tender offer at a later date.

Finally, we are concerned that Jewelcor will be irreparably harmed if defendants continue to purchase Lafayette stock without proper disclosure, since such purchases may well make it impossible for investors to 'assess the potential for changes in corporate control and adequately evaluate the company's worth,' *GAF Corp.* v. *Milstein, supra,* 453 F.2d at 717 (footnote, citation omitted), and thus effectively frustrate the relief intended to be provided by §13(d). Accordingly, we hold that Jewelcor is entitled to the limited relief of an order enjoining dfendants from purchasing stock of Lafayette until they file a Schedule 13D with the SEC and the American Stock Exchange.

So ordered." 397 F. Supp. at 252-253.

The very limited injunctive relief granted in that case has, of course, already been satisfied in the instant situation since appellants, as previously discussed, have filed a Schedule 13D. Appellee, therefore, is not entitled to the injunctive relief granted to it in this matter.

(c) The Decision of the District Court is based upon an erroneous premise.

At the time this matter was being considered by the District Court, the two pertinent decisions on the issue of irreparable harm in the context of actions under Section 13(d) were the Seventh Circuit Decision in *Mosinee Paper Corp.* v. *Rondeau,* 500 F.2d 1011 (7th Cir. 1974), and the District Court decision in *Twin Fair, Inc.* v. *Reger,* 394 F. Supp. 156 (W.D.N.Y. 1975), both of which were brought to the attention of Judge Burke. In these cases it was held that the party requesting relief need show only that the defendant transgressed Section 13(d) and that a violation of Section 13(d) alone was sufficient harm to warrant injunctive relief. It is difficult to believe that Judge Burke did not give effect to these cases in rendering his decision. There can be no other explanation for the summary treatment of irreparable harm in his opinion. On the basis of these prior cases Judge Burke reasonably felt that once he found a possible violation of Section 13(d), that in itself constituted irreparable harm. The U.S. Supreme Court decision in *Rondeau* v. *Mosinee Paper Corp., supra,* radically altered this outlook on the law by holding that traditional equitable principles of irreparable harm continue to be necessary to justify an injunction. Since Judge Burke's decision must have been based upon the presently erroneous holdings of the prior cases, his determination that plaintiff is likely to sustain irreparable damage was based upon an erroneous legal premise and should not be given weight on appeal as appellee suggests in its brief. *Delaware & Hudson Railway Co.* v. *United Transportation Union, supra; Douglas* v. *Beneficial Finance Co. of Anchorage, supra*

CONCLUSION

Appellee has not demonstrated probable sucess on the merits of its claim that appellants have entered into a conspiratorial agreement as alleged in appellee's complaint and has not shown any harm resulting from appellants' alleged violation of Section 13(d). The ruling of tne District Court granting a preliminary injunction in favor of appellee and against appellants was incorrect and should be reversed and remanded with instructions to dissolve the preliminary injunction, and with such further relief as this Court may deem appropriate.

Respectfully submitted,

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PROOF OF SERVICE

In the UNITED STATES COURT OF APPEALS
For the Second Circuit

..... Term, A. D. 197.....

No. 75-7397

STECHER-TRAUNG-SCHMIDT CORPORATION, Plaintiff-Appellee,
vs.
M.A. SELF, BEE CHEMICAL COMPANY, ROULSTON & COMPANY, INC., THOMAS ROULSTON, ARTHUR S. HECKER, and JOHN DOE,
Defendants,
M.A. SELF, BEE CHEMICAL COMPANY and ARTHUR S. HECKER,
Defendants-Appellants.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

AFFIDAVIT

Edward M. Ouimet being on his oath first duly sworn, deposes and says at the direction of BAKER & McKENZIE
130 East Randolph Drive
2700 Prudential Plaza
Chicago, Illinois 60601

attorneys for Appellants

he served two copies of the REPLY BRIEF

in the above entitled cause this 21st day of November 1975 on:

H. KENNETH SCHROEDER, JR., ESQ.
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Cleveland, Ohio 44115

by FIRST CLASS MAIL
at Chicago, Illinois, charges prepaid, and addressed as above.

And further affiant sayeth not.

Edward M. Ouimet

Subscribed and sworn to before me this
21st day of November, 1975

Notary Public.

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